CLERK'S OFFICE 3188

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 438.

LOUIS J. GABLEMAN, JR., BY HIS NEXT FRIEND, LOUIS J. GABLEMAN, SR., PLAINTIFF IN ERROR,

vs.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED OCTOBER 8, 1900.

(17,923.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 9, 1900.

1 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1899, May Session.

LOUIS J. GABLEMAN, JR, by His Next Friend, LOUIS J. Gableman, Sr., Plaintiff in Error,
vs.
PEORIA, DECATUR & EVANSVILLE RAILWAY COMPANY, Edward O. Hopkins, Receiver of the Peoria, Decatur & Evansville Railway Company, and George Colvin, Defendants in Error. } No. 546.

In error to the circuit court of the United States for the district of Indiana, at Evansville.

In this case, duly argued and submitted to this court, there arise questions of law concerning which this court desires the instruction and advice of the Supreme Court of the United States.

This action was brought originally in the superior court for Vanderburg county, in the State of Indiana, on the 28th of August, 1897, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error, in March, 1897, through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant railway company is a corporation organized under the laws of the State of Indiana, and the defendant, George Colvin, is a citizen of Indiana. The defendant, Edward O. Hopkins, was, at the time the injuries were received and the suit was commenced, receiver of the defendant railway company, by appointment of the United States circuit court for the southern dis-
2 trict of Illinois, and was, at the time of the injuries, in sole control and management of the railway company, having an office in Vanderburg county, in the State of Indiana, the defendant Colvin being in his employment as a locomotive engineer, and as his servant operating the engine at the time of the injury. The record does not show that the duties of the defendant, Colvin, extended to the operation or maintenance of the gates at the railway crossing. The record does not disclose the place of residence, or the citizenship of Hopkins, as an individual.

In due time after the commencement of the suit the defendant, Edward O. Hopkins, receiver, on his sole petition, removed the cause into the circuit court for the district of Indiana, upon the ground that it was a case arising under the Constitution and laws of the United States. A motion to remand was entered by the plaintiff in error, and overruled by the circuit court for the district of Indiana; and, at the trial subsequently, a verdict was, by direction of the court, returned for the defendants in error.

The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

(1.) Did the circuit court of the United States for the district of Indiana have, upon these facts, jurisdiction to try the cause?

(2.) Was the cause one properly removable into the circuit court of the United States?

These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision.

W. A. WOODS.
JAS. G. JENKINS.
P. S. GROSSCUP.

May 14, 1900.

3 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 2, inclusive, contain a true copy of the certificate of the United States circuit court of appeals for the seventh circuit of the fourteenth day of May, A. D. one thousand nine hundred, in the case of Louis J. Gableman, Jr., by his next friend, Louis J. Gableman, Sr., *vs.* Peoria, Decatur and Evansville Railway Company, Edward O. Hopkins, receiver of the Peoria, Decatur & Evansville Railway Company, and George Colvin, No. 546, October term, 1898, as the same remains upon the files and records of the United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this seventeenth day of May, A. D. 1900.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: Certificate. File No., 17,923. U. S. C. C. of appeals, 7th circuit. Term No., 438. Louis J. Gableman, Jr., by his next friend, Louis J. Gableman, Sr., plaintiff in error, *vs.* Peoria, Decatur & Evansville Railway Company *et al.* Filed October 8th, 1900.

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3188

Brf. of Cullop for P. E.

No. 17,923.

Filed Nov. 3, 1900.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

LOUIS J. GABLEMAN, Jr.,
by his next friend,
LOUIS J. GABLEMAN, Sr.,
Plaintiff in Error.

vs.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
EDWARD O. HOPKINS,
Receiver of the Peoria, Decatur and Evansville Railway Company,
AND
GEORGE COLVIN,
Defendants in Error.

Certificate from Circuit Court of Appeals Seventh Circuit.

Brief and Argument for Plaintiff in Error.

WILLIAM ALLAN CULLOP,
Attorney for Plaintiff in Error.

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No. 17,923.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1900.

LOUIS J. GABLEMAN, JR.,
by his next friend,
LOUIS J. GABLEMAN, SR.,
Plaintiff in Error.

vs.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
EDWARD O. HOPKINS,
Receiver of the PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
AND
GEORGE COLVIN,
Defendants in Error.

Certificate from Circuit Court of Appeals Seventh Circuit.

STATEMENT OF CASE.

This suit was commenced in the Superior Court of Vanderburg County, Indiana, against the Peoria, Decatur & Evansville Railway Company; Edward O. Hopkins, Receiver of Peoria, Decatur & Evansville Railway Company and George Colvin, an employe of the Receiver of said railway Company, to recover damages for personal injuries alleged to have been received by plaintiff on the evening of March 21st, 1897.

The receiver within the proper time allowed by law, filed a petition in the State Court for the remov-

al of the cause to the Federal Court on the sole ground that it was a case arising under the Constitution and laws of the United States.

Over objection of the plaintiff, the case was removed to the Federal Court for the District of Indiana, sitting at Evansville, Indiana. At the first opportunity upon the convening of said Court, the plaintiff filed its motion to remand said cause to the State Court, because there was no proper ground alleged in the petition for the removal of said cause from the State Court of Indiana.

This motion was overruled, proper exception taken, and the case went to trial before the Court and Jury.

At the close of the evidence the Court instructed the jury to find for the defendants.

The case was thereupon taken by writ of error, to the Circuit Court of Appeals for the Seventh Circuit, wherein an opinion was filed, reversing the judgment of the lower Court holding that the suit was improperly removed from the State Court and ordering that it be remanded to the State Court for trial.

Subsequently upon application of the defendant in error, a re-hearing was granted and the questions of jurisdiction was certified to this Court for decision.

The only questions therefore, presented to this Court for decision are: "First—Did the Circuit Court of the United States for the District of Indiana, have upon these facts, jurisdiction to try the cause?"

"Second—Was the cause one properly removable into the Court of the United States?"

These are the questions certified to this Court for its decision as shown by the certificate filed in this Court. The question raised is whether a suit against

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a Receiver appointed by a Circuit Court of the United States, commenced since the Act of March 3d, 1887, and the legislation supplementary thereto, is one arising under the Constitution and laws of the United States, and is removable to the Federal Court for that reason.

The statement of facts in the certificate of the Appellate Court is intended to present that question in this case.

There are other questions which would prevent the removal of this cause as appearing under the certificate, to-wit: The railroad Company was also a defendant and George Colvin a citizen of Indiana, a defendant, both being joined with the Receiver.

But does the fact that a Receiver of the Federal Court being sued in an action like this for simple negligence in the operation of his road, raise a federal question?

The plaintiff in error asserts now as he has asserted all along that such an action presents no federal question as it calls into review no treaty of the United States—no Constitutional provision and no federal law. It in no manner calls in review any order of the Federal Court appointing him—the construction of any federal statute,—constitutional provision or treaty of the United States. The only question this case presented was whether negligence existed authorizing a recovery under the ordinary rules of negligence—the violation of the ordinance of the City of Evansville, and the Statute of the State of Indiana.

The action was only for the purpose of determining whether the plaintiff had a claim against the defendants and the amount of that claim. These were the

only two questions so far as any rules of law are concerned; involved in this litigation, and the settlement of these two matters called into question no federal Statute, Constitutional provision, or treaty of the United States; and therefore no federal question was involved in this litigation.

The State Court had jurisdiction to try and determine whether the plaintiff had a claim against defendants and the amount of the same. After that question was determined by the State Court, if, in the plaintiff's favor, then he had a right to present that determination to the Federal Court, wherein said receivership was pending, and it make the order for payment of the same.

BRIEF AND ARGUMENT.

By virtue of the Act of March 3d, 1887, with the supplementary legislation thereto, the plaintiff had a right to commence his suit without leave of the Federal Court wherein said receivership was pending. By virtue of that Act, the State Court also had juristion.

In Wallace vs. Collins, 167 U. S. 57, it was held:

"That a case not depending upon the citizenship of the parties nor otherwise specially provided for, cannot be removed from a State Court to the Circuit Court of the United States as one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's own statement; and if it does not so appear the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings."

Also, see P. Tel. Co. vs. U. S. 155 U. S. 482.

The same point is also decided in Chapel vs. Wentworth, 155 U. S. 102.

O. S. & U. N. Ry. Co. vs. Shottowe, 162 U. S. 490.

O. S. & U. N. Ry. Co. vs. Conlin, 162 U. S. 498.

The State Court had jurisdiction.

East Lake Land Co. vs. Brown, 155 U. S. 488.

Byars vs. McAuley, 149 U. S. 608-619.

The right of removal exists only where it is given by statute.

Gibson vs. Mississippi, 162 U. S. 565.

By the Act of March 3d, 1887, 24 Statute 552, Chap. 373 it is provided action may be brought in any Court against the Receiver appointed by the United States Court; and in the case of Dillingham vs. Hawk, 23 U. S. App. 273, it was so decided and that judgment so obtained is conclusive as to the existance and amount of the claim; but the time and manner of payment must be controlled by the United States Court.

No federal question is raised here, no federal law is involved either Statutory, Constitutional or Treaty provision and none could be involved as appears from the averments of the complaint or the certified questions propounded to this Court.

C. R. I. & C Ry. Co. vs. Martin, 178 U. S. 245
W. U. Tel. Co. Ann Arbor R. R. Co. 178 U. S. 239
Blackburn vs. P. G. M. Co. 175 U. S. 571.

These cases also decide there was no separable controversy as to the defendants. The case presented a joint cause of action against all the defendants and under the statute all must join in the application for a removal under the statute, which was not done.

C R. I. & C. Ry. Co. vs. Martin, 178 U. S. 245-248.

It was a simple suit for negligence and nothing more. True, a Receiver appointed by the United States Court was a party to the action but he was only a nominal party representing the corporation, the real party for which he was acting. This was his relation to the suit and nothing more.

Gowen vs. Harley, 56 Fed. Rep. 973.

Central Trust Co. vs. E. & T. V. & G. Ry. Co. 59 Fed. Rep. 523.

Fullerton vs. Fordyce, 121 Mo. 1.

The Receiver was not a party in interest but was a proper and neccessary party because he represented the corporation. The plaintiff would have had a right to have enforced his judgment if he had recovered one, though the Receiver might have been discharged pending the litigation.

Huston vs. Texas Cen. Railroad Co. 53 Am. St. Report, 752.

Beach on Receivers, Sec. 735.

"The liability of the defendants arose under the general law, and was not created nor raised under the Constitution or laws of the United States."

Pope vs. Louisville, New Albany & Chicago Rwy. Co. 173 U. S. 573-579.

In this case the liability of the defendants arose if at all, under the general law and was not created under the Constitution or laws of the United States. This court has settled the question involved here in the case of "Bausman vs. Dickson, 173 U. S. 113, at page 114 the court says: "We are unable to find adequate ground on which to maintain the

jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as Receiver the judgment against him amounts to the denial of the validity of and authority exercised under the United States, or of the right or immunity specially set up or claimed under the Statute of the United States. It is true that the Receiver was an officer of the Circuit Court but the validity of his authority as such was not drawn in question; and there was no suggestion in the pleadings or during the trial or so far as appears, in the State or Supreme Court that any right the Receiver possessed as Receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and also had been guilty of contributory negligence. The mere order of the Circuit Court appointing a Receiver did not create a federal question under Section 709 of the Revised Statutes and the Receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the State Court. The liability of Dickson depended upon principles of general law applicable to the facts, and not in any way on the terms of the order."

At page 115 of the same opinion the court say: "Defendant did not deny that he was amenable to suit in the State courts; he did not claim immunity as Receiver from suit without previous leave of the Circuit Court and could not have done so in view of the Act of March 3d, 1887. Chap. 373,24 Statute 552; All the questions involved were questions of general law."

In the same opinion at page 115 this Court construes Section 3 of the Act of March 3d, 1887, which provides that "Every Receiver or Manager of any property appointed by any Court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without previous leave of the Court in which such Receiver or Manager was appointed; but such suit shall be subject to the general equity jurisdiction of the Court in which such Receiver or Manager was appointed, so far as the same shall be necessary to the ends of Justice."

And then this Court says in speaking of that case, "It is not denied that this action was prosecuted and this judgment rendered in accordance therewith."

Also see C. R. I. & C. Ry. Co. vs. Martin, 178 U. S. at page 251.

The State Court of Indiana therefore, had jurisdiction and such suit was subject to the general equity jurisdiction of the Court in which such Receiver was appointed, and would so administer the law applicable to said case so far as the same would have been necessary to the ends of justice. The intent of the legislation of 1887 was too narrow and not extend the jurisdiction of Federal Courts.

St. Louis Ry. Co. vs. Pacific Ry. Co. 53 Fed. Rep. 770.

In Byars vs. McAuley, 149 U. S. 608 the court says: "The jurisdiction of the federal courts is limited jurisdiction depending either upon the existance of the federal question or the diverse citizenship of the parties; and where these elements of jurisdiction

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are wanting it cannot proceed even with the consent of the parties."

The fact that the Receiver was appointed under the United States raises no Federal question in this litigation. His right to act as such Receiver is in no way involved and no law, order or decree of the court appointing him is called in question in this litigation. Therefore, the fact that he was appointed Receiver by a Federal court is no way involved in this litigation.

C. R. I. & C. Ry. Co. vs. Martin, 178 U. S. at page 251.

The rules of law applicable to this case was the law of negligence common to all courts and in no way raised any federal question whatever. The rules of law applicable to a Marshal of the United States are not applicable to the appointment of a Receiver because in that case so far as his official conduct is concerned, it depends solely upon Federal law. But the law of negligence applicable to the Receiver of the railway appointed by the Federal court involves no federal question. As the rules of law common to all courts are involved in such conduct, Hence, the authorities cited by the defendant in error on the jurisdiction of the suit against the Federal Marshal, are not in point here, because the jurisdiction of such an action over a Marshal is regulated by Federal Statute. The office of Marshal is created by Federal Statute. The power to sue him for the violation of duty is lodged in the Federal court and is not vested in any State Court. For the breach of his duties involves the construction of the Federal Statute creating and defining his duties. Therefore

it presents a very different question from that of the Receiver appointed by of a Federal Court.

In this case it will be borne in mind that it is alleged the railway company for which Hopkins was the Receiver was a corporation duly organized and existing under the laws of the State of Indiana. So that Hopkins did not occupy the position of a Receiver of a corporation created under Federal law as was the case in "Texas & Pacific Ry Co. vs. Collins, 145 U. S. 593," or by a Marshall of the United States as in "Feibleman vs. Packard, 109 U. S. 421," or of a Receiver of a National Bank as in "Kennedy vs. Gibson, 8 Wallace, 498."

"Nor did his cause of action originate or depend on the order, or appointment, or assignment made to him by virtue of the order of the United States court appointing him."

In Pope vs. L. N. & C. Ry. Co. 173 U. S. 580 this court says: "It is impossible to hold that these orders of appointment were equivalent to the laws off the United States within the meaning of the Constitution."

The sole cause of removal alleged here was that a Federal question was involved. Therefore, applying the doctrine of the decisions of this court as cited above it must very clearly appear that the order of court appointing Hopkins Receiver was not equivalent to a federal statute, a Constitutional provision, or Treaty of the United States, in other words: that it created no Federal law which was involved in the litigation here.

No question raised out of this appointment was in any way involved in this litigation. This was a corporation organized under the laws of the State of

Indiana. It was not a Federal corporation. Hopkins was not the Receiver of a Federal corporation. Therefore the legal questions involved in this litigation were the common rules of negligence applying to all courts of the land.

The State court had jurisdiction. The right of removal did not exist for the reason alleged in the petition to remove. The State court erred in sustaining the petition to remove and the Federal court for the District of Indiana at Evansville to which the cause was removed had no jurisdiction and erred in overruling the motion to remand said cause.

It was therefore tried in a court that had no jurisdiction of the subject matter or parties for the reasons herein given and the cause should have been remanded to the State court.

The court of Appeals held this to be the law in its opinion and as we think, correctly so. We therefore submit that the court of Appeals was right in its opinion in holding that the Federal court had no jurisdiction, and ordering the cause to be remanded.

The cases cited by defendant in error as shown heretofore, are not in point for the reason that a Marshal's duties are defined by Federal Statute, his office is created by Federal Statute and therefore his acts in the breach of duty carry with them the construction of a Federal Statute defining his duties. And also where a corporation is organized under an act of Congress a Receiver appointed for such corporation is calling in question by his acts the construction of the Federal Statute because of such corporation being organized by virtue of the Federal law.

These questions are not involved in this litigation

nor in the questions propounded here for this Court to decide, for the reason given heretofore, viz: This is a corporation organized under a State law and in the action against Receivers the jurisdiction is given to State courts by the Legislation of 1887 with its supplementary acts thereto, and that no attack is made upon any of the orders, decrees, judgments or the law appointing the Receiver and authorizing his appointment; but the only questions to be tried are simply those of the common rules of negligence applicable to all courts.

The State court had jurisdiction of the parties and of the subject matter and the suit was properly brought in the State court and no right of removal existed for the reason given in the petition.

The questions here propounded require answering, as they were decided by the circuit court of Appeals, in the negative.

We therefore submit the case believing in the position we have always maintained, that the cause was erroneously removed from the State court and the petition for removal should have been denied, and that the motion of the plaintiff in error of the Federal court to remand said cause to the State court, should have been sustained; and that the decision of the Circuit court of Appeals was correct in holding that the Federal court had no jurisdiction and that the cause should be remanded. And for this order we respectfully pray.

WILLIAM ALLAN CULLOP,
Attorney for Plaintiff in Error.

No. 438.

Office Supreme Court U.S.
FILED
OCT 8 1900
JAMES H. McKENNEY,
Clerk.

[illegible] Horton for [illegible]

Supreme Court of the United States.

Filed Oct. 8, 1900.

OCTOBER TERM, A. D. 1900.

438

[illegible] GABLEMAN, Jr.
[illegible]

[illegible] DECATUR AND EVANS
[illegible]

[illegible] from [illegible] Court
[illegible]

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

LOUIS J. GABLEMAN, JR.,
By his next friend,
LOUIS J. GABLEMAN, SR.,
Plaintiff in Error,

vs.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
EDWARD O. HOPKINS,
Receiver of the PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
AND
GEORGE COLVIN,
Defendants in Error.

Certificate from Circuit Court of Appeals, Seventh Circuit.

STATEMENT OF THE CASE.

This suit was commenced in the Superior Court of Vanderburgh county, Indiana, against Edward O. Hopkins, Receiver of the Peoria, Decatur and Evansville railway company, George Colvin, an employe, and the Peoria, Decatur and Evansville railway company, to recover damages for personal injuries claimed to have been received by the plaintiff, on the evening of March 21, 1897. The Receiver, within the time allowed by law, filed a petition in the State Court, for the removal of the case to the Federal Court, on the ground that it was one arising under the

Constitution and Laws of the United States. The case was so removed and afterward tried in the Circuit Court at Evansville, resulting in a judgment for the defendants. The case was thereupon taken by writ of error to the Circuit Court of Appeals for the Seventh Circuit, where an opinion was filed, holding that the suit was improperly removed from the State Court, and ordering that it be remanded to that Court. That decision, as shown by the opinion filed, was influenced by the case of *Pope* vs. *Louisville, New Albany & Chicago Ry.*, reported in 173 U. S. 573, decided after the submission of the present case in the Circuit Court of Appeals. Subsequently, a re-hearing was granted, and the following certificate issued to this Court:

"In this case, duly argued and submitted to this Court, there arise questions of law concerning which this Court desires the instruction and advice of the Supreme Court of the United States.

"This action was brought originally in the Superior Court for Vanderburgh County, in the State of Indiana, on the 28th of August, 1897, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error in March, 1897, through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant Railway Company is a corporation organized under the laws of the State of Indiana, and the defendant George Colvin is a citizen of Indiana. The defendant Edward O. Hopkins was, at the time the injuries were received and the suit was commenced, Receiver of the defendant Railway Company by appointment of the United States Circuit Court for the Southern District of

Illinois, and was at the time of the injuries in the sole control and management of the Railway Company, having an office in Vanderburgh County, in the State of Indiana, the defendant Colvin being in his employment as a locomotive engineer and as his servant operating the engine at the time of the injury. The record does not show that the duties of the defendant Colvin extended to the operation or maintenance of the gates at the railway crossing. The record does not disclose the place of residence or the citizenship of Hopkins as an individual.

"In due time after the commencement of the suit the defendant Edward O. Hopkins, Receiver, on his sole petition, removed the cause into the Circuit Court for the District of Indiana, upon the ground that it was a case arising under the Constitution and Laws of the United States. A motion to remand was entered by tne plaintiff in error and overruled by the Circuit Court for the District of Indiana, and at the trial subsequently, a verdict was by direction of the Court returned for the defendants in error.

"The questions of law upon which this Court desires the advice and instruction of the Supreme Court are:

"(1) Did the Circuit Court of the United States for the District of Indiana have upon these facts jurisdiction to try the cause?

"(2) Was the cause one properly removable into the Circuit Court of the United States?

"These questions the Court this day orders certified and submitted to the Supreme Court of the United States for its proper decision."

The Certificate is properly entitled and signed by the Judges of that Circuit Court of Appeals.

The question raised in the argument in the Circuit Court of Appeals and discussed in the opinion there filed, was, whether a suit against a Receiver

appointed by a Circuit Court of the United States, commenced since the Act of March 3, 1887, is one arising under the Constitution and Laws of the United States, and so removable to the Federal Court. The statement of facts in the certificate is intended to present that question.

The Peoria, Decatur and Evansville Railway Company was made a defendant, but it is certified that the Receiver "was at the time of the injuries in sole control and management of the Railway Company." George Colvin, a citizen of Indiana, is also a defandant, but it is certified that he was in the Receiver's "employment as a locomotive engineer and as his servant operating the engine at the time of the injury." And to make the question more distinct and to show that a case was presented in which the liability of the Receiver was separate from that of Colvin, it was further certified that "the record does not show that the duties of the defendant Colvin extended to the operation or the maintenance of the gates at the highway crossing," which was one of the charges of negligence in the declaration.

The facts disclosed raise the single question of the right of a Receiver appointed by a Federal Court to remove a case commenced against him in a State Court. The question is not affected by the joinder of the other defendants, because, under the certificate, the Railway Company is not liable, and it is to be assumed that the record does not show a liability; George Colvin was not responsible for the condition of the gates, under the facts certified, and

hence, a distinct liability against the Receiver is presented, and moreover, Colvin's connection with the negligence charged against him, was solely as an agent of the Receiver. For the reasons shown and decisions cited in the following Brief, an affirmative answer should be given to both questions certified.

BRIEF.

The plaintiff could not have commenced his suit in the State Court, without leave of the Federal Court, but for the Act of March 3, 1887.

Barton vs. *Barbour*, 104 U. S. 126;
Davis vs. *Gray*, 16 Wall., 203.

The Receiver was in the possession of, and operating the railroad by virtue of authority derived from a Court of the United States. The injuries complained of, were received by the plaintiff, in March, 1897. The action therefore is against a person whose powers come from a Federal Court, and the suit one which can be maintained only by virtue of an act of Congress. It is, then, one arising under the Constitution and Laws of the United States.

Act of Congress, March 3, 1887;
Texas & Pacific Railway Co. vs. *Cox*, 145 U. S. 593;
Rouse vs. *Hornsby*, 161 U. S. 588.
White vs. *Ewing*, 159 U. S. 36;
Black's Dillon on Removal of Causes, Sec. 125;
Tennessee vs. *Union and Planter's Bank*, 152 U. S. 454.

Inasmuch as the Receiver's authority, in such cases, is dependent upon his appointment by a Court existing under the Constitution and Laws of the United States, his right to remove a cause against him has been likened to that of a Marshal (*Texas & Pacific Railway Co.* vs. *Cox*, 145 U. S. 593). It has been decided that the Circuit Court has jurisdiction of a suit against a Marshal as one so arising.

Sonnentheil vs. *Moerlein Brewing Co.*, 172 U. S. 401;
Bachrack vs. *Norton*, 132 U. S. 337.

And it has also been decided that the Marshal may remove a suit brought against him in his official capacity.

Feibelman vs. *Packard*, 109 U. S. 421;
Bock vs. *Perkins*, 139 U. S. 628.

That the position of the two officers is similar, is further illustrated by the holding that actions against the Receiver are, in law, actions against the Receivership or the funds in the hands of the Court, and his liabilities are official and not personal.

McNulta vs. *Lochridge*; 141 U. S. 327;
Porter vs. *Sabin*, 149 U. S. 473;
Union Bank vs. *Kansas City Bank*, 136 U. S. 223;
Davis vs. *Gray*, 16 Wall 203, 218.

And a suit against a corporation organized under the laws of the United States, is removable, though the act of the corporation complained of, may have had no connection with the federal law.

Pacific Railroad Cases, 115 U. S. 1;
Osborn vs. *Bank of United States*, 9 Wheat., 738;
Texas & Pacific Ry. vs. *Cody*, 166 U. S. 606.

The joinder of the other defendants did not affect the Receiver's right to remove the suit. An action against the Railway Company or against George Colvin would undoubtedly have been dependent upon citizenship, but the plaintiff chose to join with them a third defendant, the Receiver, the jurisdiction over whom was dependent upon another principle. The case was one, and that a case in which the jurisdiction was not dependent entirely upon the opposite parties to the suits being citizens of different States.

Sonnentheil vs. *Moerlein Brewing Co.*, 172 U. S. 401, 405.

Moreover, the Certificate shows that the Receiver was "at the time of the injuries, in the sole control and management of the Railway Company." It is, therefore, to be treated like a case where the Declaration does not state a cause of action against the Company.

Chamberlain vs. *N. Y. L. E. & W.*, 71 Fed., 636;
Jewett vs. *Whitcomb*, 69 Fed., 417;
Warax vs. *Railway Company*, 72 Fed., 637;
Memphis, etc., Railroad vs. *Hoechner*, (C. C. A. 6th Ct.), 67 Fed., 456.

This Certificate presents a different question from that where the corporation and the Receiver are jointly operating the property, as in

Railroad vs. *Jones*, 155 U. S., 333;
Railroad vs. *Brown*, 17 Wall, 445.

Nor did the joinder of George Colvin affect the right to remove, because,

(a) The Certificate recites that Colvin's duties did not extend to the operation or maintenance of the gates at the railway crossing, the failure to operate which was one of the charges of negligence. In that respect, a separate controversy was averred against the Receiver.

Fergason vs. *C. M. & St. P.*, 63 Fed., 177.

(b) The Certificate recites that the defendant, Colvin, was in the Receiver's employment as a locomotive engineer and "as his servant," operating the engine at the time of the injury. The rule is, that a joint liability is not shown in a suit against an employer and employe, where the sole negligence is that of the employe, and the employer was not present and participating.

Landers vs. *Felton*, 73 Fed., 311;
Warax vs. *Railway*, 72 Fed., 637.

(c) But in any view, if a separate liability cannot be asserted against a Receiver, except under the Laws of the United States, then a joint liability can not be asserted against him, except by virtue of the same laws, and as held above, the jurisdiction of such

a suit is not entirely dependent upon diversity of citizenship.

Landers vs. *Felton*, 73 Fed., 311;
Sonnentheil vs. *Moerlein Brewing Co.*, 172 U. S., 401, 405.

Since the Railway Company was only a nominal party, and Colvin, the engineer, not jointly liable with the receiver, especially so, under the charge of negligence in maintaining crossing gates, the jurisdiction of the Circuit Court was not affected by the fact that the removal of the case was on petition of the receiver alone. The suit was one arising under the laws of the United States, and the joinder of other defendants under the conditions shown in the certificate did not deprive the receiver of his right to remove the case.

Southern Pacific Ry. vs. *Townsend*,62 Fed. 161;
Mitchell vs. *Smale*, 140 U. S. 406;
Fergason C. M. & St. P., 63 Fed. 177;
Chamberlain vs. *N.Y. L.E. & W.*, 71 Fed. 636.

The question cannot arise whether it appears in the declaration that the suit is one arising under the laws of the United States, since it must be assumed that the facts properly appear as set forth in the Certificate. But even otherwise, in a case of this kind, it is not necessary that it should appear in the declaration that the case is one arising under the Laws of the United States. That rule applies to cases wherein the ground of action depends upon a law of the United States, and not to suits in which

the character of the defendant confers the jurisdiction.

Texas & Pacific Railway vs. *Cody*, 166 U. S. 606, 609.

The above cases have been accepted very generally by the Circuit Courts, as decisive of the right of a Receiver of a United States Court to remove a cause, as was done here. For example, see:

Jewett vs. *Whitcomb* (C. C. E. D. Wis.) 69 Fed., 417;

Chamberlain vs. *N. Y. L. E. & W.* (C. C. N. D. Oh.), 71 Fed., 636;

Landers vs. *Felton*, (C. C. Ky.), 73 Fed., 311;

Central T. Co. vs. *E. T. V. &c.* (C. C. Ky.), 59 Fed., 523;

Sullivan vs. *Barnard* (C. C. W. D. Mo.), 81 Fed., 886;

Board of Commissioners &c. vs. *Peirce* (C. C. N. D. Oh.), 90 Fed., 764;

Pitkin vs. *Cowen* (C. C. S. D. Oh.), 91 Fed., 599;

Carpenter vs. *N. P. Ry.* (C. C. Wash.), 75 Fed. 850;

Kethl vs. *City of South Bend* (C. C. A. 9th Ct.), 76 Fed., 921.

Neither the case of *Pope* vs. *Louisville, New Albany & Chicago*, 173 U. S. 573, nor that of *Bausman* vs. *Dixon*, 173 U. S. 113, involve the elements which were held to establish the jurisdiction in earlier cases. The *Pope* case was commenced by the Receiver, not

against him. It was in the Court having jurisdiction of the original case and was held to be so subordinate to it that an appeal would not lie to the Supreme Court, unless it would also lie in the original case. The Act of March 3, 1887, which is one of the main reasons for sustaining the jurisdiction, could have no application. The *Bausman* case was commenced against a Receiver in the State Court, but he did not deny the jurisdiction of that Court, nor seek to have the suit removed to a Federal Court, for trial. The only question was, whether the Supreme Court had jurisdiction under Section 709 of the Revised Statutes to review the judgment. Manifestly, the effect of the Act of March 3, 1887, on the question here raised, could not be considered in either of those cases, and hence, they should not be taken as modifying the earlier decisions of this Court.

ARGUMENT.

There are numerous decisions of this Court, holding that prior to the Act referred to, in this connection, as the Act of March 3, 1887, a suit could not be maintained against a Receiver, except by leave of the Court by which he was appointed.

Barton vs. *Barbour*, 104 U. S., 126;
Porter vs. *Sabin*, 149 U. S., 473;
Texas & Pacific Ry. vs. *Cox*, 145 U. S., 593;
Davis vs. *Gray*, 16 Wall, 203.

The rule was expressed in the case of *Barton* vs. *Barbour* as follows:

"We, therefore, declare it is our opinion that when the Court of one State has a railroad or other property in its possession for administration as trust assets and has appointed a Receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the right of all persons interested therein, a Court of another State has not jurisdiction, without leave of the Court by which the Receiver was appointed, to entertain a suit against him for a cause arising in the State in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty with respect of such property."

The effect of the above decision is, that a State Court has no jurisdiction of a case brought against a Federal Court, without leave of that Court, except as such jurisdiction is conferred by the subsequent Act of Congress. In March, 1887, an Act was passed which contains the following provision:

"That every Receiver or Manager of any property appointed by any Court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the Court in which such Receiver or Manager was appointed, but such suit shall be subject to the general equity jurisdiction of the Court in which such Receiver or Manager was appointed, so far as the same shall be necessary to the ends of justice."

24 U. S. Stat., 552.

By virtue of that law a suit can now be commenced in the State Court, without leave, as was done in this case, but such suit can only be maintained there by force of this Federal Statute. Clearly, a suit in which the jurisdiction is dependent upon a

law of Congress is one arising under the Constitution and Laws of the United States, as has been held by this Court.

The case of *Texas & Pacific Railway Co.* vs. *Cox*, 145 U. S, 593, was a suit commenced against a Receiver in a Federal Court, other than that by which he was appointed, to recover damages for personal injuries. The part of the Act of March 3, 1887, given above, is quoted in the opinion, and after a full consideration of its effect upon the right to begin a suit against a Receiver without leave, the question of jurisdiction is summed up in the following language:

"As jurisdiction without leave is maintainable through the the Act of Congress, and as the Receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the Circuit Court, in the exercise of its judicial powers, we hold that jurisdiction existed because the suit was one arising under the Constitution and Laws of the United States."

The federal jurisdiction was sustained not because the railroad company over whose property the Receiver was appointed was organized under the laws of Congress, but because the suit was brought under the Act of March 3, 1887 and the defendant was a Receiver appointed by a United States Court. Though the Receiver in that case was appointed to take charge of the property of a company organized under the laws of Congress, yet the suit was to recover damages for personal injuries and it was claimed plaintiff was entitled to recover under the laws of the State of Louisiana as well as under the laws of the State of Texas,

it being averred that they were substantially the same. No rights were claimed under the laws of the United States, nor was it any part of the defense that the Railroad Company, of whose property the Receiver was in charge, was a corporation organized under the laws of Congress. The corporation was not operating the property at the time of the accident, nor liable therefor. The Receiver was an officer of a Court created by the Constitution and Laws of the United States, and neither his rights nor liability in the particular case were in any way influenced by the fact that the Railroad Company was a federal company. The questions at issue in that case were in no way affected by the organization of the Company which formerly controlled the property, and that point is not noticed in the language showing the view of the Court on which the jurisdiction was sustained. The decision is upon the clear ground that the Receiver was an officer of a Court created by the Laws of the United States; that the suit was one which, under the Act of March 3, 1887, could be brought without leave of the Court in which the Receiver was appointed and hence, one arising under the Constitution and Laws of the United States.

In the case of *Rouse* vs. *Hornsby*, 161 U. S. 588, the corporation over whose property the Receiver was appointed, was organized under the laws of the State of Kansas, yet this Court referred to the grounds of federal jurisdiction, in cases like the present in the following language.

"If, as is said, the intervenor, the Railroad Company, and the receivers were all citizens of Kansas and this had been an action at law and not a petition of intervention in the equity suit, the jurisdiction of the Circuit Court would nevertheless have been maintained on the ground that it was one arising under the Constitution and Laws of the United States in that the receivers were appointed by the Circuit Court and derived their powers from and discharged their duties subject to those orders, *and the right to sue them as such without leave of the Court which appointed them was conferred by Section 3 of the Act of March 3, 1887, 373, 24 Stat. 552.*"

Again, in the case of *Tennessee* vs. *Union & Planters Bank*, 152 U. S. 454, the following reference was made to the case of *Texas & Pacific Railway Company* vs. *Cox*, and to the principles on which the federal jurisdiction was there sustained.

"This Court, speaking by the Chief Justice, after observing that the corporation would have been entitled, under the Act of 1875, to remove a suit brought against it in a State Court, maintained the jurisdiction of the Circuit Court of the United States of the action against the Receivers under the Act of 1887, upon the ground that the right to sue without leave of the Court which appointed them, Receivers appointed by a Court of the United States, was conferred by Section 6 of that Act, and therefore the suit was one arising under the Constitution and Laws of the United States."

Language cannot be plainer than that used by Justice Gray, in the above quotation. The opinion in the Cox case is there explained, and, as must be concluded from the opinion itself, the jurisdiction was put upon the ground not that the Receiver had charge of the property of a federal company, but because he exercised his powers under appointment of

a Federal Court, and the suit could not have been brought against him, but for an Act of Congress.

These decisions, which should require an affirmative answer to the questions certified, are in direct line with the cases in which the character of the Receiver's position is considered. He is an officer of the Court. His possession is that of the Court. Whatever rights or powers he may exercise is under the authority of and is the act of the Court itself. His liability is not personal, but official. He is an officer discharging duties under authority of the Laws of the United States, under which the Court exists.

In *Porter* vs. *Sabin*, 149 U. S., 473, Mr. Justice Gray, among other things, said:

"When a Court exercising jurisdiction in equity appoints a Receiver of all of the property of a corporation, the Court assumes the administration of the estate; the possession of the Receiver is the possession of the Court; and the Court itself holds and administers the estate, through the Receiver as its officer, for the benefit of those whom the Court shall ultimately adjudge to be entitled to it."

In the case of *Union Bank of Chicago* vs. *Kansas City Bank*, 136 U. S. 223, it was, on page 236, said:

"A Receiver derives his authority from the act of the Court appointing him and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property."

In *Davis* vs. *Gray*, 16 Wall., 203, it is said that

money or property in the Receiver's hands is in *custodia legis*.

Receiver Hopkins is, then, an officer of the Court. His possession of the property is the possession of the Court. He is its agent, and the Court which, through him, was operating the engine in question, was created by, and derived its powers from the Constitution and Laws of the United States. He acts in an official capacity, under federal appointment. This Court has likened him to the holder of an office created by the law of congress. In the case of *Texas Pacific Railway* vs. *Cox* 145 U. S. 593, above cited, the Court, after holding that because the Receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the Circuit Court, the jurisdiction in the Federal Court existed, since the suit was one arising under the Constitution and Laws of the United States, said that its conclusion was "in harmony with previous decisions," and cited, in support of its statement, the cases of *Buck* vs. *Colbath*, 3 Wall., 334; and *Feibelman* vs. *Packard*, 109 U. S 421, both of which were suits against a Marshal of the United States. In those cases the removal was justified, because the inquiry was, whether the Marshal had rightfully executed a precept directed to him by a Court of the United States. Since this court has in this manner likened the office of a Receiver to that of a Marshal, it is at least proper and consistent to cite in this connection the jurisdiction of the Circuit Court over a case commenced against a Marshal and his right to

remove to the Federal Court a suit commenced against him in the State Court.

The case of *Sonnentheil* vs. *Moerlein Brewing Company*, 172 U. S. 401, was an action at law brought against certain defendants, including a marshal of the United States for the Eastern District of Texas, to recover the value of stock seized by him. The attaching creditor and another were joined as defendants. With reference to the jurisdiction, the court, among other things, said (page 405):

"It thus appears that the jurisdiction of the Circuit Court did not depend entirely upon diversity of citizenship between the plaintiff and the Brewing Company, but upon the fact that one of the defendants was a marshal of the United States and was acting in that capacity when he seized the goods in question. Had the action been brought against the marshal alone, there can be no doubt that the Circuit Court would have had jurisdiction of the case as one arising under the Constitution and laws of the United States. *Feibelmann* vs. *Packard*, 109 U. S. 421; *Bachrack* vs. *Norton*, 132 U. S., 337. It is true that in these cases the action was against the marshal, and the sureties upon his bond, but there is no difference in principle. The right of action in both cases is given by the laws of the United States, which make the marshal responsible for trespasses committed by him in his official capacity. (Cases cited.) If suits against a bank or railways chartered by Congress are suits arising under the laws of the United States, as held in *Osborn* vs. *United States Bank*, 9 Wheat., 738, and in *Pacific Railway Removal cases*, 115 U. S. 1, with even greater reason must it be considered that a suit against a marshal of the United States, for acts done in his official capacity, falls within the same category."

The case of *Feibelman* vs. *Packard*, 109 U. S. 421, was an action brought in the State Court against a

marshal and his sureties, to recover for an alleged illegal seizure of goods. The defendants removed the case to the Federal Circuit Court, and this action was assigned for error. The court, in its opinion, citing section 783 of the Revised Statutes, which provides that "in case of a breach of the condition of a marshal's bond, any person thereby injured may institute in his own name and for his sole use a suit on said bond and thereupon recover such damages as shall legally be assessed," etc, held that the suit was one arising under the laws of the United States. The section of the Statute there referred to authorized a suit to be brought on the marshal's bond, in case of damage sustained. The Act of March 3, 1887, likewise authorizes a suit to be commenced in any court against a receiver, and but for such Act, the suit, without leave, could not be maintained. If the former is sufficient for the holding that a suit against a marshal is one arising under the Laws of the United States, then the other should be sufficient for a like decision, when a receiver appointed by a Federal Court is the defendant. The inquiry in this case is, whether receiver Hopkins was negligently exercising the authority imposed in him by the Federal Court, to operate the railroad—whether the court itself, in whose possession the railroad and train were—had, through its agent or officer, been guilty of negligence causing injury to the plaintiff. The right of the marshal, in such a case, is defined in the case of *Bock* vs. *Perkins*, 139 U. S. 628, as follows (page 630):

"A case, therefore, depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States, is one arising under the laws of the United States; for, as this court has said, 'cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege or claim or protection or defense of the party in whole or in part by whom they are asserted.'"

The receiver derived his powers from the Circuit Court and discharged his duties subject to its orders. Those orders were entered and all actions of the court in the premises taken by virtue of judicial power possessed and exercised under the Constitution and laws of the United States.

Again, it is held that a suit against a corporation organized under the laws of the United States, is removable, though the act complained of may have had no connection with the federal law. In what is known as the *Pacific Railroad Cases*, 115, U. S. 1, the suits were based on different causes of action. There, the court, basing its opinion on the early case of *Osborne* vs. *The Bank of the United States*, 9 Wheat. 738, acquiesced in for more than sixty years, held that since the defendant railroad companies were organized under the laws of the United States and derived not only their existence but "their power, their functions, their duties, and a large portion of their resources from those acts, and by virtue thereof, sustain important relations to the Government of the United States," any suit against them was one arising

under the laws of the United States, within the meaning of the removal statute. The causes of action involved were in no way founded upon a law of the United States, nor was the defense affected by the fact that the defendant was a federal corporation. The jurisdiction was sustained solely upon the ground of the character of the defendants and because their powers and duties were derived from federal laws. In this case, the receiver, as held in the cases from which quotations have been made, was an officer of the court, managing property in the possession of the court, deriving all authority for his acts from a court of the United States. The courts for the District of Indiana and the Southern District of Illinois, and not receiver Hopkins, were in possession of the railroad. He was their representative, and, except as empowered by them, had no authority in the premises.

The Circuit Court of Appeals, in its opinion, distinguished between the right of a corporation created by a law of Congress, to remove a cause, and that of a receiver appointed by a Federal court, but this court has recognized that the character of the defendant may be sufficient for the assertion that the suit is one arising under the Federal Constitution and laws. The Act of Congress empowered the Pacific Railroad companies to sue and be sued. A court of the United States empowered its Receiver, in like manner; and, without authority or leave, a suit could not be brought against him in another jurisdiction. Then, a law of Congress, the Act of March 3, 1887,

was enacted, which, like the charters in the Pacific Railroad cases, authorized a receiver to be sued. In this case, as in the Pacific Railroad cases, the suit is maintained because of authority given by Congress. Every act of the receiver is derived from the fact that he represents the court. His act is its act. There can be no distinction between a suit brought against property in the possession and management of a Federal court and one against a marshal or company created by act of Congress.

But it was intimated in the opinion of the Circuit Court of Appeals, that the case of *Texas & Pacific Railway Company* vs. *Cox*, sustained the jurisdiction, because the company could have removed the cause. We do not so understand that decision. The company was not a party to the suit; It was not liable for the injuries there complained of, and its joinder as a defendant would not have altered the course of the case. While the receiver held the property and property rights of the Company, he was not the Company, and under no principle could he remove a case simply because the Company itself, being a federal company, could have done so. The right of removal was not one of the charter rights or privileges which would pass to, and could be exercised by, one succeeding to the possession of the property. The Texas & Pacific Railroad company could have removed the case, because it was chartered by the United States; the Receiver could have done the same thing, because he represented a court created by the laws of the United States, and not because a

privilege personal to the corporation had passed to him. As to argue the receiver could remove the suit because the company could have done so, it might as well be said that William Jones, a citizen of Indiana, receiver of the property of John Smith, a citizen of Illinois, could remove a case brought against the receivership by another citizen of Indiana, because John Smith, on account of his citizenship could have done so had he been the defendant. The right of removal is not a property right passing to a receiver or successor, but a privilege personal to the individual or company, which he or it may exercise when a defendant.

But that this court did not intend to sustain the jurisdiction in the *Cox* case, on the ground that the corporation was created by an Act of Congress, is shown by the language in the subsequent case of *Rouse* vs. *Hornsby*, 161 U. S. 588, cited above, in which the railroad company, over whose property the receiver was appointed, was created under the laws of the State of Kansas, yet in that case, it was said that the jurisdiction was maintainable on the ground that it was one arising under the Constitution and laws of the United States "in that the receivers were appointed by the Circuit Court and derived their powers from, and discharged their duties subject to, those orders, and the right to sue them as such and without leave of the court which appointed them was conferred by section 3 of the Act of March 3, 1887," and citing, the Texas & Pacific case.

And in the case of *Tennessee* vs. *Union & Planters Bank*, 152 U. S. 454, Mr. Justice Gray, in explaining the case of *Texas & Pacific Railway* against *Cox*, among other things said:

"This court, speaking by the Chief Justice, after observing that the corporation would have been entitled, under the Act of 1875, to remove a suit brought against it in a state court, maintained the jurisdiction of the Circuit Court of the United States of the action against the receivers, under the Act of 1887, *upon the ground that the right to sue without the leave of the court which appointed them receivers appointed by a court of the United States was conferred by section 6 of that Act and, therefore, the suit was one arising under the Constitution and laws of the United States.*"

The jurisdiction was sustained, not because the company could have removed the suit, but because the suit itself could only be maintained by virtue of the Act of March 3, 1887, and hence, was one arising under the laws of the United States.

We refer to these cases again, because of the construction put upon them by the court below, and because the plain language used in the decisions themselves will justify but one construction, namely, that the suit is removable, because the receiver stands for the court, and the suit itself is one maintainable by force of an Act of Congress.

The cases of *Pope* vs. *Louisville, New Albany & Chicago*, 173 U. S. 573, and *Bausman* vs. *Dixon*, 173 U. S. 113, decided after this case was submitted in the Circuit Court of Appeals, seem to have influenced the first decision in that court, yet neither of those cases involve the elements which established the jur-

isdiction in the earlier cases. The fact that it is only by virtue of an Act of Congress, that such a suit can be maintained without leave of the court appointing the receiver, is one of the principle grounds for the conclusion that it is a suit arising under the laws of the United States, yet that point was not, and could not, be raised in either the *Pope* or *Bausman* case. The former was commenced *by* the receiver and not *against* him. It was in the court having jurisdiction of the original case and was held to be so subordinate to it that an appeal would not lie to the Supreme court, unless it would also lie in the original suit.

An examination of that case shows that the effect of the Act of March 3, 1887, was not considered, and could not be, because the suit was commenced by the receiver. The Act is not mentioned in the course of the opinion. Manifestly, the Act of March 3, 1887, could have no application to the jurisdiction in such a case.

The *Bausman* case was a suit against a receiver, commenced in a state court, yet the receiver did not ask the court to have the case removed to the Federal court for trial, and hence the only authority of this court to review the final judgment of the state court, was that given by section 709 of the Revised Statutes. Jurisdiction is there given to examine upon writ of error, a final judgment in the highest court of a state, upon the following grounds only: (1) Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against

their validity; (2) or where there is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; (3) or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

Under the limitation of section 709, the question of a receiver's right to remove a case to a Federal court, or of the jurisdiction of the Circuit Court, in a case like the present, could not possibly be raised, unless the receiver had petitioned for the removal of the cause and his petition denied. The question was not raised in the *Bausman* case, because no effort was made toward removing it to the Federal court. That the scope of the *Bausman* case is so limited, is evidenced by the following words from the opinion filed:

"The mere order of a Circuit Court appointing a receiver did not create a federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order which he asserted was abridged or taken away by the decision of the state court."

In the *Bausman* case, there is a reference to *Capital National Bank of Lincoln* vs. *First National Bank of Cadiz*, 172 U. S. 425, where it was held, notwith-

standing the fact that one of the parties was a receiver of a bank organized under the laws of the United States, that the judgment of the Supreme Court of the state was not reviewable in the Supreme Court of the United States, because none of the conditions prescribed in 709 of the Revised Statutes were involved. The distinction between those cases and the present was made in the following language, found in the opinion:

"The receiver made no effort to remove the litigation to the Circuit Court, contested the issue on a general denial and set up no claim of a right under Federal statutes withdrawing the case from the operation of general law. In these circumstances, the result is that this court has no jurisdiction to revise the judgment of the Supreme Court of Nebraska."

If an effort had been made to remove either of those cases and the petition denied by the state court, the jurisdiction of the Supreme Court would then have existed.

Stone vs. *South Carolina*, 117 U. S. 430.

This court has in no way departed from the decisions which have influenced the Circuit Courts to sustain the jurisdiction in these cases, and neither the *Pope*, *Bausman* nor *Capital National Bank* case should be cited as establishing a contrary rule. In neither of them was the present question involved, namely, the right of a receiver appointed by a Federal court to remove from a State court a case commenced therein under the authority of the law of the United States known as the Act of March 3, 1887.

The cases cited above as sustaining the jurisdiction, have been generally accepted by the Circuit Courts as enabling receivers to remove to the Federal courts suits commenced against them. As illustrating this general acceptance of the meaning of this court, we refer to the following decisions of the Circuit Court and Circuit Court of Appeals.

Jewett vs. *Whitcomb* (C. C. E. D. Wis.) 69 Fed., 417;

Chamberlain vs. *N. Y. L. E. & W.* (C. C. N. D. Oh.), 71 Fed., 636;

Landers vs. *Felton*, (C. C. Ky.), 73 Fed., 311;

Central T. Co. vs. *E. T. V. &c.* (C. C. Ky.), 59 Fed., 523;

Sullivan vs. *Barnard* (C. C. W. D. Mo.), 81 Fed., 886;

Board of Commissioners &c. vs. *Peirce* (C. C. N. D. Oh.), 90 Fed., 764;

Pitkin vs. *Cowen* (C. C. S. D. Oh.), 91 Fed., 599;

Carpenter vs. *N. P. Ry.* (C. C. Wash.), 75 Fed. 850;

Keihl vs. *City of South Bend* (C. C. A. 9th Ct.), 76 Fed., 921.

In all these cases, the jurisdiction was sustained on the authority of the decisions of this court, to which we have referred. It seems almost incredible that so many Circuit Courts could have erred in the interpretation of language so plain and direct, adopted by this court, in those decisions.

The right of the receiver to remove a cause was not affected by the joinder of the other defendants. The right to remove an action against the railway company or against George Colvin, would, undoubtedly, have been dependent upon citizenship, but the plaintiff chose to join with them a defendant, the receiver, the jurisdiction over whom was dependent upon another principle, and the plaintiff could not deprive that defendant of his right to remove a a cause, which, as to him, was one arising under the Constitution and laws of the United States, by joining with him the other defendants. It was so decided in the case of *Sonnentheil* vs. *Moerlein Brewing Co.*, 172 U. S. 401, a suit against a marshal and other defendants, in which, this court, on page 405, said:

"The joinder of another defendant, jurisdiction over whom was dependent upon diversity of citizenship, deprived the marshal of no right he otherwise would have possessed. Though there are two defendants, the case was *one*, and that a case in which the jurisdiction was not dependent *entirely* upon the opposite parties to the suit being citizens of different States. Had two suits been brought, one of them would undoubtedty have been dependent upon citizenship, and the other a case arising under the laws of the United States. But as the plaintiff chose to join both defendents in a single action, jurisdiction of that action was not wholly dependent upon either consideration. Had the jurisdiction of the Circuit Court been originally invoked solely upon the ground of diversity of citizenship as applied to the Brewing Company, the case would have fallen within the *Colorado Central Mining Company* vs. *Turck*, 150 U. S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application."

Moreover, the certificate recites that the receiver was "at the time of the injuries, in the sole control and management of the Railway Company." So that, so far as the company is concerned, the declaration or petition is to be treated as one not stating a cause of action against the company. Under the statement of the certificate, a case of liability was not presented against the company.

Chamberlain vs. *N. Y. L. E. & W.*, 71 Fed., 636;

Jewett vs. *Whitcomb*, 69 Fed., 417;

Warax vs. *Railway Company*, 72 Fed., 637;

Memphis, etc., R. R. vs. *Hoechner* (C. C. A. 6th Ct.), 67 Fed., 456.

This certificate does not present a state of facts like that in the case of *Railroad* vs. *Jones*, 155 U. S. 333, and *Railroad* vs. *Brown*, 17 Wall, 445, where the corporation and the receiver were jointly operating the property and jointly liable, but a case in which the receiver alone was, at the time, operating the property, and hence alone responsible for such operation.

Nor did the joinder of George Colvin affect the right to remove, because,

(a) The certificate recites that George Colvin's duties did not extend to the operation or maintainance of the gates at the railway crossing, the failure to operate which was one of the charges of negligence. So that, under the certificate, there is in the suit a controversy, separate and distinct, between the

plaintiff and the receiver alone. In that respect, a separate liability is alleged, as held by Judge Shiras, in the case next cited, in which an engineer was joined as defendant with a railroad company. The complaint in that case charged negligence in running the engine, and also that the engine under which plaintiff was thrown was improperly constructed. The court decided the complaint declared upon two distinct causes of action; that the company would be liable for failure to perform its duty to turnish a safe engine, but that the engineer was not charged with that duty or the consequence of a breach thereof, and hence a separate controversy existed and the railway company could properly remove the case to the Federal court.

Ferguson vs. *C. M. & St. P. Ry.* (C. C. Iowa), 63 Fed., 177.

(b) The certificate recites that the defendant, Colvin, was in the receiver's employment as a locomotive engineer and "as his servant" operating the engine at the time of the injury. The rule is, that a joint liability is not shown in a suit against an employer and employe, where the sole negligence is that of the employe, and the employer was not present and participating. The principle controlling is well stated by Judge Taft, in the case of *Landers* vs. *Felton*, 73 Fed., 311, as follows:

"It is very clear that under the decision of this court in the case of *Warax* vs. *Railway Company*, 72 Fed., 637, on the face of the plaintiff's petition, Pannell is improperly joined as party defendant with the receiver and the Southern Railway Company, because

the petition seeks to hold the defendants for the negligence of their servant, without showing in any way any other ground for their liability, except the negligence of the servant. On such averment, a joint liability is not shown. Nor is the *Cincinnati, New Orleans & Texas Pacific Railway Company* properly joined as defendant in the suit, because no cause of action is shown against it. It is not liable for the torts of the receiver."

Neither the petition nor this certificate avers that the receiver personally participated in the alleged negligent act of the engineer, and so the joint liability attempted to be presented was based solely upon the ground of the relationship between the receiver and the engineer. The better rule is, that under such conditions, the employer is liable severally only and not jointly with the employe.

Warax vs. *C. N. O. & T. P. Ry.* (C. C. Ky.), 72 Fed., 637.

(c) But in any view, if a separate liability cannot be asserted against a receiver, except under the laws of the United States, then a joint liabily can not be asserted against him, except by virtue of the same laws. If the suit against the receiver was one arising under the Constitution and laws of the United States, then a suit against him and his employe is of the same character and may be removed. The language of Judge Taft, in the case of *Landers* vs. *Felton*, 73 Fed., 311, is in point:

"The question here arises whether an action brought against a receiver of the United States court and others who are citizens of the same State as that of the plaintiff, to establish a joint liability of

all the defendants, is a suit arising under the laws and Constitution of the United States. I do not see how it can be otherwise. No separate liability could be asserted against the receiver, as receiver, except under the laws of the United States. If no separate liability could be asserted against him, except by virtue of those laws, certainly no joint liability with another can be asserted against him, except by virtue of the same laws. Therefore, the joint liability of the defendants with the receiver arises under the laws and Constitution of the United States. If the plaintiff wished to sue the other defendants without joining the receiver, he had his election to do so, because the liability of the joint tort feasors is also several. He might, therefore, have retained his action against the resident defendants in a State court without any possibility of removal to a Federal court. He elected, however, to join the resident defendants with the person against whom he could establish no liability in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore, the joint cause of action which he asserts against all the defendants must find its sanction in the Federal statutes. Hence, the cause of action is removable."

There are many like decisions of the Circuit Courts, as already indicated, but, that the joinder of the other defendants did not deprive the receiver of the right to remove seems so perfectly settled by the case of *Sonnentheil* vs. *Moerlein Brewing Co.*, 172 U. S. 401, that further discussion of that branch of the case is unnecessary.

The question cannot arise whether it appears in the declaration the suit is one arising under the laws of the United States, because it must be assumed the facts set forth in the certificate properly appear. But even otherwise, in a case of this kind, it is not

necessary, as has been held by this court, that it should appear in the declaration, the case is one arising under the laws of the United States. That rule applies to cases wherein the ground of action depends upon a law of the United States, and not to suits in which the character of the defendant confers the jurisdiction. A receiver appointed by a Federal court, or a company organized under the laws of Congress, can not be deprived of the right to remove the suit by an averment that the receiver was appointed by a State court, or that the company was organized under the laws of some State.

Texas & Pacific Ry. vs. *Cody*, 166 U. S. 606, 609.

But not only must the certificate be taken as it is, but, in fact, the declaration or petition of the plaintiff recited that the receiver was appointed by a Circuit Court of the United States.

The certificate states the case was removed on the sole petition of the receiver. But the other facts stated, to which the attention of the court has already been directed, show that the railway company was a nominal defendant only, not liable under the averments of the certificate, that as to one act of negligence, Colvin was not jointly liable with the receiver, and as to the other act of negligence—maintenance of the crossing gates—there was no connection between him and the receiver, whatsoever. Whether one of several defendants can, as a rule, remove a case as one arising under the laws of the United

States, is not material, because here, under the certified facts, the controversy was single in so far as the receiver was concerned, and his right could not be taken away by the joinder of these other defendants.

Southern Pacific Ry. vs. *Townsend*, 62 Fed. 161;
Mitchell vs. *Smale*, 140 U. S. 406;
Fergason C. M. & St. P., 63 Fed. 177;
Sonnentheil vs. *Moerlein Brewing Co.*, 172 U. S. 401.

The authorities have been referred to, to an unnecessary extent, perhaps, because of the decision first made by the Circuit Court of Appeals. That decision was, no doubt, influenced by the case of *Pope* vs. *Louisville, New Albany & Chicago Ry.*, 173 U. S. 573, and *Bausman* vs. *Dixon*, 173 U. S. 113 neither of which involved the elements which were, held by this court to establish the jurisdiction in the earlier cases. The language used by this court in *Texas & Pacific Ry.* against *Cox*, *Rouse* vs. *Hornsby*, 161 U. S. 588, and *Tennessee* vs. *Union & Planter's Bank*, 152 U. S. 454, is so plain as to admit of no discussion of its meaning. The Circuit Courts, generally, have accepted the plain English of those cases and sustained the right of a receiver, appointed by a Federal court, to remove a case commenced against him in the State court. The receiver, therefore respectfully insists that the questions submitted by the Circuit Court of Appeals should both be answered in the affirmative.

Other questions arising on the records in the Circuit Court of Appeals have not been referred to, because the jurisdictional question is the only one certified.

Respectfully,

W. S. HORTON,

Attorney for Defendants in Error.

No. 438. 438

31910

NOV 15 1900

JAMES H. McKENNEY, Clerk

By W. S. Horton for D. C. (Reply)

Supreme Court of the United States.

Filed Nov. 15, 1900.

OCTOBER TERM, A. D. 1900.

LOUIS J. GABLEMAN, JR.,
By his next friend,
LOUIS J. GABLEMAN, SR.,
Plaintiff in Error,

vs.

PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
EDWARD O. HOPKINS,
Receiver of the PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY,
AND
GEORGE COLVIN,
Defendants in Error.

Certificate from Circuit Court of Appeals, Seventh Circuit.

REPLY FOR DEFENDANTS IN ERROR.

W. S. HORTON.
Attorney for Defendants in Error

Edward Mine & Co., Printers, Peoria, Ill.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

LOUIS J. GABLEMAN, JR.,
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AND
GEORGE COLVIN,
Defendants in Error.

Certificate from Circuit Court of Appeals, Seventh Circuit.

REPLY FOR DEFENDANTS IN ERROR.

It was agreed between the attorneys for the respective parties, that this case should be submitted upon printed argument, the argument for defendants in error to be first filed, because they were the moving cause of the certificate to this court, and with the right reserved to them of filing a reply to the argument for plaintiff in error, should they deem it necessary. This reply is presented, because of the case of *Chicago, Rock Island & Pacific Railway Company* vs. *Martin*, reported in volume 178 U. S. Reports, on

page 245, issued since the main argument for defendants in error was filed. That case is cited by plaintiff in error as authority for the denial of the jurisdiction in this suit. The distinction, however, between that case and this seems to us apparent.

The case of *Chicago, Rock Island & Pacific Railway Company* vs. *Martin*, was brought against the Chicago, Rock Island & Pacific Railway Company and Clark and others, who were receivers of the Union Pacific Railway Company, to recover damages for the death of the plaintiff's intestate, while a passenger on a train of the Union Pacific Railway Company, with which a train of the Chicago, Rock Island & Pacific Company collided. The declaration or complaint charged the servants of each defendant with negligence in the operation of their respective trains, and that, through such negligence, they jointly caused the death. It was, therefore, a case against defendants, each of whom participated in the negligence alleged to have caused the injury. The receivers in that case were not receivers of the property of the other defendant and in the sole management of such property, at the time complained of. Each of the defendants was, through its servants, in the active use of the railroad and through their joint neglect, the death was caused. Manifestly, the case presented a joint cause of action.

The certificate in the present case states different conditions. The receiver was, "at the time the injuries were sustained and the suit was commenced, receiver of the defendant railway company by ap-

pointment of the United States Circuit Court for the Southern District of Illinois, and was, at the time of the injuries, in the sole control and management of the railway company." The company, therefore, was not present, through its servants, or otherwise, and in no way participated in, or was responsible for, the injury. The rule of liability, under such circumstances, is stated by a text writer as follows:

"Section 721. It is well established that a railway corporation, which is in the hands of a receiver, who is operating the road as a common carrier, under statutory provisions or by virtue of an order of court, is not accountable for injuries occasioned by the negligence of the employes of the receiver. If a corporation be sued for such injuries, it has a perfect defense in the plea that at the time the injuries complained of were inflicted, it was in the hands of a receiver, duly appointed and operating the road. This rule is well founded upon principle, since the corporation after the appointment, has no control over the employes of the receiver; and also for the further reason that, as we have just stated, the receiver is responsible for such injuries in his official capacity, and judgment may be had against the estate in his hands."

Beach on Receivers, Section 721.

The conclusion of that writer is supported by numerous decisions, among others, the following:

Hicks vs. *I. & G. N. R. R.*, 62 Tex. 38;
Metz vs. *B. C. & P. R. R.*, 58 N. Y. 61;
Turner vs. *Hannibal & St. Joe*, 74 Mo. 602;
Chamberlain vs. *N. Y. L. E. & W. R. R.*, 71 Fed. 636;
Jewett vs. *Whitcomb*, 69 Fed. 417;
Warax vs. *Railway Company*, 72 Fed. 637;
Memphis, etc. Railroad vs. *Hoechner*, (C. C. A. 6th Ct.) 67 Fed. 456;

The case here presented is one in which the possession of the receiver was exclusive, and the employes were hired and controlled by him. The road was not being managed on the joint account of the receiver and lessees of the company, as in *Railroad Company* vs. *Brown*, 17 Wall. 445, nor was it controlled by the agents and employes of the company, or the receiver's functions restricted to the receipt of a share of the net earnings, as in *Pennsylvania Railroad Company* vs. *Jones*, 155 U. S. 333. It is a case of property being in the sole control and management of a receiver, and, therefore, no case was stated against the railway company, one of the defendants, and as between the plaintiff and the railway company and receiver, a single controversy is stated, and that between the plaintiff and the receiver.

In our argument in chief, numerous decisions were cited to sustain the contention that a joint liability was not shown against the receiver and his engineer, George Colvin. There are two charges of negligence: one in the operation of a railway train, the other, the failure to properly operate the gates at a railway crossing. It is certified that George Colvin was in the employment of the receiver, as a locomotive engineer, and, as his servant was operating the engine at the time of the injury, but that his duties did not extend to the operation or maintenance of the gates at the railway crossing; therefore, in so far as the record presents a liability dependent on negligence in operating the crossing gates, the controversy between the receiver and the plaintiff is wholly sepa-

rate and distinct from that against the other defendants.

But if the cause of action against the receiver and his engineer were joint, it should make no difference to the receiver's right of removal. We respectfully submit that the rule governing that view of the case, was correctly stated by Judge Baker, of the Circuit Court, in his opinion, as follows:

"But if the cause of action against the receiver and his engineer were joint, it would make no difference in the receiver's right of removal. No liability can be asserted against the receiver, for misfeasance or nonfeasance in performing the duties of his office, except under and by virtue of the laws and constitution of the United States. The joint liability asserted in the complaint against the receiver and his engineer is one arising from and growing out of the operations of the receivership, and hence is one arising under the constitution and laws of the United States, under and in virtue of which the receivership was created and exists."

Gableman v. B. & O. R. R. Co., 82 Fed. 79.

The negligence of Colvin, the engineer, grew out of the operation of this federal receivership, and hence the suit, whether viewed with reference to his act or that of the receiver, was one arising under the constitution and laws of the United States.

The certificate, however, does not state a case of joint liability between the receiver and Colvin. He was the engineer in charge of the engine, the negligent operation of which is alleged as one cause of the injury. He was the servant of the receiver. The receiver was not personally present and participating in the negligence. The liability of the engineer arose from his own wrongful act in running the engine

against and over the plaintiff, while that of the receiver, so far as liability depends on the negligence of Colvin, grows out of the master's liability for the negligent or tortious act of his servant when engaged about the master's business.

The rule was stated by Chief Justice Gray, in *Mulchey* vs. *Religious Society*, 125 Mass. 487, as follows:

"If there was any negligence in the agents, Barber & Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intendment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a wilful injury done by an agent by the command or authority of his principal, in which both are in law principal trespassers and, therefore, liable jointly."

Hopkins, the receiver, was in the possession and management of the railroad, and it may be properly assumed that his orders were for the careful operation of the trains, and that, in so far as Colvin was negligent, he violated the rules of the receiver. The certificate does not present a case of an injury done by the servant by command or authority of his employer, but rather a breach of the principal's orders, and, hence, it was not their joint act or neglect which caused the injury. The authorities which hold a master is not jointly liable with his employe, in such cases, are numerous, including the following:

Warax vs. *C. N. O. & T. P. Ry.*, 72 Fed. 637;
Clark vs. *Frye*, 8 O. St., 358, 377;
Campbell vs. *Sugar Co.*, 62 Me. 553;
Page vs. *Parker*, 40 N. H. 47-68;
Landers vs. *Felton*, 73 Fed. 311;
Hartshorn vs. *A. T. & S. F. R. R.* (C. C. Mo.), 77 Fed. 9;
Herman Berghoff Brewing Co. vs. *Przbylski*, 82 Ill., App. 361;
Doremus vs. *Root, et al.* (C. C. Wash.), 94 Fed. 760;
Burch vs. *Caden Stone Co.*, 93 Fed. 161.

The authorities sustain the contention that this certificate submits facts showing a separable controversy between the receiver and the plaintiff in error, and in this connection, it is to be noticed that under this certificate a liability might be established against the receiver and not against Colvin. Even if it can be said that a receiver and his employe can be sued jointly for injuries resulting from the negligent act of the employe, this record presents distinct controversies. Failure to prove the negligence against Colvin would not, necessarily, entitle the receiver to a verdict in his favor. He is also charged with negligence in the operation of the crossing gates, to which the duties of Colvin did not extend. If negligence in the operation of the crossing gates was the proximate cause of the injury, the plaintiff could recover against the receiver, but not against Colvin. Surely, under such a record, it cannot be said, as was said in the

case of *Chicago, Rock Island & Pacific Railway* against *Martin*, that there is no separable controversy.

In *Beuttel* vs. *C. M. & St. P.*, 26 Fed. 51, Mr. Justice Shiras, illustrated the distinct controversy between the company and its engineer, in a suit wherein facts were presented whereby judgment could be entered against the company, though a verdict might go in favor of the engineer, and held that in such a suit the controversy was separable. He stated in his conclusion as follows:

"Under the averments of fact in the petition, two controversies are presented, one between plaintiff and defendant Emsley, and one between plaintiff and the defendant company. In the controversy between plaintiff and Emsley, the company has no part nor lot. It has no legal interest therein; and if the plaintiff and Emsley were citizens of different States, the latter could remove the action, even if the company and plaintiff were citizens of the same State. In the controversy between plaintiff and the company, Emsley has no legal interest. The cause against the company not only can be separated, but must be separated from that against Emsley, because the grounds of liability are legally different. Although the case may be tried as one before the same jury, the issues upon which the liability of the defendants depends are different, and cannot be made the same by any form of averment in the petition."

The case of *Chicago, Rock Island & Pacific Railway* vs. *Martin*, 178 U. S. 245, above referred to, was one in which no separable controversy, as between the different defendants, was presented. They were jointly liable, and hence, it was held the suit could not be removed, except upon the joint application of the defendants, even though, as to one, the suit arose

under the constitution and laws of the United States. Here, the controversy is separable. The certificate, on its face, shows the railway company is not liable, and no case is stated against it. It appears, furthermore, that Colvin is only in the case as the employe of the receiver, and that his acts were involved in only one branch of the suit, and that, as to that, a joint liability was not shown; that the case against the receiver went much further, and a possible liability was raised against him, without regard to the negligence of the engineer. Therefore, there is a separable controversy, and as to that controversy, the receiver stands alone, and, under the authority of the case last mentioned, he could rightfully remove the case on his sole application.

The plaintiff in error has referred to a number of cases holding there can be no removal, unless it appears by the plaintiff's own statement, that the case is one arising under the constitution or laws of the United States. This court has pointed out the distinction between a case in which the claim is based upon a law of the United States and one in which the right of removal depends upon the character of the defendant. In the latter case, the right of removal cannot be prevented by failure of the plaintiff to state the defendant's true character or a misstatement of that character. It was so decided in the case of *Texas & Pacific Ry. Co.* vs. *Cody*, 166 U. S. 606.

Moreover, the questions submitted are to be answered upon the facts stated in the certificate and the character of the defendant is clearly shown therein.

Defendants in error, therefore, again respectfully submit that the questions presented by the Circuit Court of Appeals of the Seventh Circuit, should be answered in the affirmative.

Respectfully,

W. S. HORTON,

Attorney for Defendants in Error.

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Supreme Court of the United States.

No. 438.—October Term, 1900.

Louis J. Gableman, Jr., by his next friend, Louis J. Gableman, Sr., Plaintiff in Error,
vs.
The Peoria, Decatur and Evansville Railway Company, Edward O. Hopkins, Receiver of the Peoria, Decatur and Evansville Railway Company, and George Colvin.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[December 10, 1900.]

The certificate in this case was as follows:

"This action was brought originally in the superior court for Vanderburg County, in the State of Indiana, on the 28th of August, 1897, by the plaintiff in error, a citizen of Indiana, against the defendants in error, to recover damages for personal injuries said to have been sustained by the plaintiff in error, in March, 1897, through the negligence of the defendants in error in the operation of a railway train, and the failure to properly operate the gates at a railway crossing. The defendant railway company is a corporation organized under the laws of the State of Indiana, and the defendant, George Colvin, is a citizen of Indiana. The defendant, Edward O. Hopkins, was, at the time the injuries were received and the suit was commenced, receiver of the defendant railway company, by appointment of the United States Circuit Court for the Southern District of Illinois, and was, at the time of the injuries, in sole control and management of the railway company, having an office in Vanderburg County, in the State of Indiana, the defendant Colvin being in his employment as a locomotive engineer, and as his servant operating the engine at the time of the injury. The record does not show that the duties of the defendant, Colvin, extended to the operation or maintenance of the gates at the railway crossing. The record does not disclose the place of residence, or the citizenship of Hopkins, as an individual.

"In due time after the commencement of the suit the defendant, Edward O. Hopkins, receiver, on his sole petition, removed the cause into the Circuit Court for the District of Indiana, upon the ground that it was a case arising under the Constitution and laws of the United States. A motion to remand was entered by the plaintiff in error, and overruled by the Circuit Court for the District of Indiana; and, at the trial subsequently, a verdict was, by direction of the court, returned for the defendants in error.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

"(1.) Did the Circuit Court of the United States for the District of Indiana have, upon these facts, jurisdiction to try the cause?

"(2.) Was the cause one properly removable into the Circuit Court of the United States?"

Mr. Chief Justice FULLER delivered the opinion of the Court:

The general policy of the act of March 3, 1887, corrected by the act of August 13, 1888, (24 Stat. c. 373, p. 552; 25 Stat. c. 866, p. 443,) as is apparent on its face, and as has been repeatedly recognized by this court, was to contract the jurisdiction of the Circuit Courts. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 462, and cases cited.

And it is well settled that a case cannot be removed from a State court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement of his own claim, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings. *Walker* v. *Collins*, 167 U. S. 57.

It has also been determined that when the application rests on that ground, and there is more than one defendant, all the defendants must join. *Railway Company* v. *Martin*, 178 U. S. 245.

And in respect of the removal of actions of tort on the ground of separable controversy, that the existence of such controversy must appear on the face of the plaintiff's pleading, and that it does not so appear, if the defendants are charged with direct or concurrent or concerted wrongful action. *Railway Company* v. *Dixon*, 179 U. S. —.

In this case the pleadings are not before us, and the certificate states that the receiver removed the cause into the Circuit Court, on his sole petition, "upon the ground that it was a case arising under the Constitution and laws of the United States." A motion to remand was made and denied. 82 Fed. Rep. 791. This decision was afterwards reversed by the Circuit Court of Appeals, but, as is admitted, a rehearing was granted, and this certificate was then made. 101 Fed. Rep. 1.

The receiver rested his contention that the case arose under the Constitution and laws of the United States on the single ground of his appointment by the Federal court; and, upon this record, our opinion of the tenability of that ground is requested.

Section 3 of the acts of 1887 and 1888 reads:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional

right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal court.

The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act.

As, however, the receiver, as the officer of the court, holds the property for the benefit of all who have an interest in it, and is not to be interfered with in its administration and disposal by the judgment or process of another court, the closing clause of the section, out of abundant caution, provides that when the receiver is sued, without leave, "such suit shall be subject to the general equity jurisdiction of the court in which said receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

Of course it devolves on the court in possession of the property or funds out of which judgments against its receiver must be paid to adjust the equities between all parties, and to determine the time and manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them. But, as we observed in *Railway Company* v. *Johnson*, 151 U. S. 103, "the right to sue without resorting to the appointing court, which involves the right to obtain judgment, cannot be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it."

In *Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S. 243, we said, in the language of previous opinions, that when a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained. *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Company*, 175 U. S. 571; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505.

The inquiry we are pursuing does not fall within the ruling that a corporation created by Congress has a right to invoke the jurisdiction of the

Federal courts in respect to any litigation it may have, except as specifically restricted.

Nor are the cases against United States officers as such, or on bonds given under acts of Congress, or involving interference with Federal process, or the due faith and credit to be accorded judgments, in point.

The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that Constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined as the Circuit Court of Appeals properly held in this case. *Bausman* v. *Dixon*, 173 U. S. 113; *Pope* v. *Railway Company*, 173 U. S. 573; *McKenna* v. *Simpson*, 129 U. S. 506; *Provident Savings Society* v. *Ford*, 114 U. S. 635.

In *Bausman* v. *Dixon* we ruled that a judgment against a receiver appointed by a Circuit Court of the United States, rendered in due course in a State court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the State of Washington, though the receiver was the officer of the Circuit Court, and we said: "It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the State Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the State court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order." And although that was the case of a writ of error to a State court, we applied the reasoning in *Pope* v. *Railroad Company*, in which the right of appeal to this court from the Circuit Court of Appeals was asserted on the ground that the case arose under the Constitution and laws of the United States, because Pope was a receiver of a Federal court. We decided that

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the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the Constitution, and that the mere order of a Federal court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We said: "The bill nowhere asserted a right under the Constitution or laws of the United States, but proceeded on common law rights of action. We cannot accept the suggestion that the mere order of a Federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States."

The question there was as to whether or not the decision of the Circuit Court of Appeals was made final by the sixth section of the judiciary act of March 3, 1891, and we held that it was, and dismissed the appeal. We could not, however, have arrived at that conclusion if the jurisdiction had rested on the ground that the case arose under the Constitution or laws of the United States, as such cases are not among the classes enumerated in that section, in which the decisions of that court are made final. We have repeatedly held that the jurisdiction of such proceedings is dependent upon that of the main case. *Rouse* v. *Letcher*, 156 U. S. 49; *Gregory* v. *Van Ee*, 160 U. S. 143; *Carey* v. *Railroad Company*, 161 U. S. 115. In *Rouse* v. *Letcher*, we pointed out that the intention could not be attributed to Congress of allowing judgments on every incidental controversy to be brought to this court for review, while denying such review to the principal decree; and any other conclusion would be manifestly inconsistent with the avowed object of the act of March 3, 1891.

It should be added that while these actions against receivers may be brought in other courts, they may, nevertheless, also be brought in the court by which the receiver was appointed, inasmuch as the judgments recovered are payable from the property or funds in the course of administration, and the actions may be regarded as ancillary in the sense of subordination to such administration.

We have just held in *Baggs, Receiver*, v. *Martin, ante*, p. —, that where a receiver sued in the State court had removed the action to the Circuit Court, which had appointed him, and the plaintiff had not moved to remand but had accepted the jurisdiction thus invoked, a judgment in that court in plaintiff's favor might be sustained, because the court would have had original jurisdiction, and it did not lie in the mouth of the receiver, under such circumstances, to deny the jurisdiction he had sought.

The judgments in *Texas & Pacific Railway Company* v. *Cox*, 145 U. S. 593; *Tennessee* v. *Union & Planters Bank*, 152 U. S. 454; and *Hornsby* v. *Rouse*, 161 U. S. 588, cited by counsel, are consistent with the result reached in Baggs' case as well as in this, although there are expressions in the opinions in those cases which are modified by what has since been said.

The questions propounded are answered in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.